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No. 87-1678

In The

Supreme Court of the United States

October Term, 1987

W. E. JOHNSON, Warden,

v. *Petitioner,*

CHRISTOPHER DEMOS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

April 29, 1988

FORREST S. LATTA
NETTLES, BARKER, JANECKY & COPELAND, P.C.
3300 First National Bank Bldg.
Post Office Box 2987
Mobile, Alabama 36652
Telephone: (205) 432-8786

Counsel for Respondent Court Appointed

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

25pp

QUESTIONS PRESENTED

1. Whether a state trial court, with knowledge that an indigent defendant's competence to stand trial is a significant issue, has a duty to grant a motion for appointment of a psychiatrist to assist in developing material facts on that issue and/or to make further inquiry into the facts of his competence to determine whether a *Pate* competency hearing should be held.

2. Whether a state court decision on competence to stand trial is entitled to "deference" under 28 U.S.C. § 2254(d) where the state court did not resolve the merits of the dispute, did not employ a factfinding procedure adequate to afford a full and fair hearing, and did not permit adequate development of the material facts.

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v. *Petitioner,*

CHRISTOPHER DEMOS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Respondent Christopher Demos (hereinafter "Demos"), a prisoner of the State of Alabama, was granted a writ of habeas corpus in the United States District Court for the Southern District of Alabama. That judgment was affirmed by the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *Demos v. Johnson*, 835 F.2d 840 (11th Cir. 1988). The orders of the

District Court dated November 26, 1984, and September 18, 1986, were not reported and are reproduced in App. A, *infra* 1a-3a.

The Alabama trial and appellate courts issued no opinions in the habeas corpus proceedings. The opinion of the Alabama Court of Civil Appeals affirming the underlying conviction is reported at *Demos v. State*, 57 Ala.App. 588, 329 So.2d 646 (Ala.Civ.App. 1976).

JURISDICTION

Petitioner invokes the jurisdiction of this Court "under 28 U.S.C. § 2101(c)." Certiorari jurisdiction does exist under 28 U.S.C. § 1257(3).

The petition was filed within ninety (90) days after the judgment and opinion of the Eleventh Circuit Court of Appeals on January 15, 1988. Petitioner did not file an Application for Rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Due Process Clause of the Fifth Amendment of the United States Constitution provides, in pertinent part:

> "[N]or be deprived of life, liberty, or property, without due process of law;"

2. The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> "[N]or shall any State deprive any person of . . . life, liberty, or property, without due process of law;"

3. The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

4. The United States Code, 28 U.S.C. § 2254(d), provides in pertinent part:

> "In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court . . . in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear . . .
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> . . .
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding;

(7) that the applicant was otherwise denied due process of law;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record: . . ."

5. The Code of Alabama, Ala. Code § 15-16-21 (1975), provides in pertinent part:

"If any person charged with any felony is held in confinement under indictment and the trial court shall have reasonable ground to doubt his sanity, the trial of such person for such offense shall be suspended until the jury shall inquire into the fact of such sanity, such jury to be impaneled from the regular jurors in attendance for the week or from a special venire, as the court may direct. If the jury shall find the accused sane at the time of its verdict, it shall make no other inquiry, and the trial in chief shall proceed. If it finds that he is insane at that time, the court shall make an order committing him to the Alabama state hospitals, where he must remain until he is restored to his right mind."

STATEMENT OF THE CASE

A. Facts Material to The Questions Presented

On August 21, 1975, Demos was arrested and charged with murdering his former wife. Indigent counsel was appointed at arraignment on October 20, and Demos pleaded "not guilty by reason of insanity." The case was set for trial November 13, 1975.

A week after arraignment, on October 28, Demos filed a motion seeking examination by an "independent" psychiatrist to determine his mental ability to aid in his own defense. A second such motion, dropping the word "independent", was filed October 31.

At a pretrial hearing on November 5 defense counsel advised the court that after he filed the first motion he "was told, and understood, that if I revised that motion to have him sent to Searcy [a state mental hospital], it would be agreed to." He stated, and the prosecutor acknowledged, that the examination agreement was reached with another judge who presided at arraignment. Defense counsel further advised that medical records were being obtained from two mental institutions in Ohio, where Demos was treated in 1969. He stated Demos had "a history of psychiatric treatment" and, in his opinion, "some mental condition, and I think some brain damage from the use of drugs since he was twelve years old."

At a further pretrial hearing on November 7, Demos' mother testified that Demos, age 24, suffered from mental problems caused by the long-term abuse of

toluene.[1] He had "been on glue for 12 or 13 years," which she believed may have caused brain damage[2] and did cause a complete character change since his childhood. Demos had been 7th grade class president before he started sniffing glue.

Mrs. Demos opined that her son had violent, depressive, and uncontrollable periods, and needed further treatment.[3] She also opined, after the judge stated the propriety of such opinions, that Demos was unstable and not "in the state of mind of making a rational decision." Upon cross-examination, she detailed a history of Demos' crime since being addicted to glue. The

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1. Toluene is a liquid aromatic chemical commonly used in certain kinds of glue and solvents.

2. The possibility of residual mental effects in chronic toluene users is documented in medical studies. *See, e.g.*, F.B. Glaser, *Inhalation Psychosis and Related States*, 14 Arch. Gen. Psych. 315 (1966); D.A. Grabski, *Toluene Sniffing Producing Cerebellar Degeneration*, 118 Am. J. Psych. 461 (1961); J. Lewis, D. Moritz & L. Mellis, *Long-Term Toluene Abuse*, 138:3 Am. J. Psych. 368 (1981); R. Satran & V. Dodson, *Toluene Habituation*, 268 New England J. Medicine 719 (1963). That was confirmed by the State's psychiatric expert in evidentiary hearings below. Although he found no brain dysfunction in Demos upon examination 11 years after trial, he could not rule out a possible "residual effect" of Demos' previous toluene abuse, "not having seen him at the time."

3. Mrs. Demos did not testify, as petitioner incorrectly states, that Demos "was completely normal" when not on glue. Pet. for Cert. p.8.

court, however, refused to make any further inquiry into Demos' competency by way of a *Pate* hearing[4] or appointment of a psychiatrist.

Defense counsel thereupon moved for a continuance of the November 13 trial date to allow further time to obtain Demos' records from the two Ohio mental hospitals. The trial court refused the continuance,[5] which produced this exchange:

> "[Counsel]: Your Honor, we need time to get the records here, and by putting a deadline on us of next week when we are operating as indigent counsel without adequate funds to get them here, is an undue injustice on the defendant's rights. And I

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4. Under Alabama law, when the facts known to the trial court raise a reasonable ground to question the accused's competence, the court must empanel a jury to conduct a *Pate* competency hearing. Ala.Code § 15-16-21 (1975). *Cf. Pate v. Robinson*, 383 U.S. 375, 385 (1966)(same statute–new trial ordered); *Brinks v. State of Alabama*, 465 F.2d 446, 450 (5th Cir. 1972)(same statute–new trial ordered). That statute was brought to the trial court's attention by the prosecutor at the time Demos sought a competency hearing.

5. Demos was allowed only eight days (six working days) from November 5, 1975, to obtain his medical records from the two Ohio mental hospitals. The Court of Appeals discussed this, and Demos submits it is virtually a matter of judicial notice that such a deadline for obtaining out-of-state medical records is unrealistic, even today. *See* 835 F.2d at 840 n.5. Indeed, the court's refusal to grant a continuance was independent error. *United States v. Edwards*, 488 F.2d 1154, 1163 (5th Cir. 1974); *Hintz v. Beto*, 379 F.2d 937, 941-43 (5th Cir. 1967).

> feel like Your Honor ought not to limit your continuance to a deadline. If we do not have them by that time, I think we would be entitled to continue beyond that. And it places a burden on us of not knowing whether we are going to have a trial.
>
> [Court]: Does the defendant request a ruling now on your evidence?
>
> [Counsel]: No, sir, its not that. We are requesting Your Honor not to limit us to next week. You are placing an undue burden on us by asking us to get prepared for a trial on an indigent case when we don't know if the evidence is going to be here.
>
> [Court]: *That's the point.* Overrule."

(Emphasis added) Demos' defense counsel, in hearings below, testified that the state judge seemed to have a "thorough understanding . . . that the likelihood of us being [able] to get the information we needed was not going to occur."

On the day of trial, Demos' motions for a psychiatric examination were reconsidered and denied "on the *lack of evidence* that was before this Court as to his insanity at the time of commission of the crime and to his ability to aid in the conduct of this trial." (emphasis added) Demos again objected to the court's denial of a continuance. The evidence at trial showed Demos was high on toluene when the crime occurred and was sitting nude under a table inhaling toluene and drinking beer when apprehended.

At the conclusion of the evidence, Demos moved for a mistrial due to the court's erroneous denial of a continuance and of a psychiatric examination. That motion was denied. The jury, nonetheless, was instructed on the insanity defense. Demos was found

guilty of first-degree murder and sentenced to life in prison.

The conviction was affirmed by the Alabama Court of Civil Appeals, which acknowledged Demos' toluene addiction, but held there was no *Pate* violation or abuse of discretion in denying a continuance. *Demos v. State*, 57 Ala. App. 588, 591, 329 So. 2d 646 (1976). Demos' *pro se* state habeas petition was filed July 6, 1982, asserting in part as follows:

> "That he the petitioner has never had a mental evaluation that was due to him by Respondent and that Petitioner never seen or talked to a psychiatrist and that Petitioner plead not guilty by reasons of insanity. Evaluation could and would have been help on behalf of defense."

It was denied by the same state court judge who presided at trial, and the Alabama Court of Civil Appeals affirmed without opinion. Certiorari was denied without opinion by the Supreme Court of Alabama. *Demos v. State*, No. 83-543 (Ala. April 29, 1983)

B. Basis for federal jurisdiction

This habeas petition pursuant to 28 U.S.C. § 2254 was filed October 12, 1983. It raised three constitutional attacks springing from the state's failure to appoint a psychiatrist. First, the court breached a binding pretrial agreement to have Demos examined by a state psychiatrist. Second, it committed a *Pate* violation by failing to hold a competency hearing or make further inquiry into that issue. Third, it committed an *Ake* violation by refusing to appoint a psychiatrist to examine Demos, an indigent, accused of first-degree

murder under which 'state of mind' was an element. *See Ake v. Oklahoma*, 470 U.S. 68 (1985).

By order of November 26, 1984, the United States District Court for the Southern District of Alabama determined that a *Pate* violation occurred. By order of September 18, 1986, it further found an unconstitutional violation of the "pretrial examination agreement." The court thereupon granted the writ subject to retrial by the state within 120 days. *See* App. A, *infra* 3a. The Court of Appeals reversed as to the "pre-trial agreement" but affirmed the judgment granting the writ because of the *Pate* violation. The Court of Appeals did not address the *Ake v. Oklahoma* issue, which was raised in the District Court and passed upon in that court's order of November 13, 1986. *See* App. A, *infra* 5a.

ARGUMENT AGAINST GRANTING THE WRIT

1. The Court of Appeals decision does not "conflict" with other federal cases.

Petitioner incorrectly summarizes the Eleventh Circuit's holding as stating: "A history of drug use . . . require[s] a state trial court to find that the defendant is incompetent to stand trial." Pet. for Cert. p.14. To the contrary, and consistent with *Pate* and its progeny, the court held that under the facts known to the state court the "failure to grant a psychiatric examination or to make *further inquiry* into the accused's competence was a *Pate* violation and denied him a fair trial." 835 F.2d at

844. (emphasis added) *See, e.g., Drope vs. Missouri,* 420 U.S. 162, 174 (1975).

The Court of Appeals did not say prior drug abuse equates with legal incompetence. It is, however, a "relevant factor," the court considers in determining whether further inquiry should be made, as petitioner correctly observed. Pet. for Cert. p.19, *citing United States v. Oliver,* 626 F.2d 254, 258-59 (2nd Cir. 1980). That "factor," which alone might be sufficient to raise a reasonable question as to competence in some cases, was only part of the information known to the trial court here.

As petitioner has noted, the state court heard Demos' mother's testimony regarding his chronic glue-sniffing since age 12, the resulting change in his character, and his prior psychiatric treatment at two Ohio institutions. It was stated that such chronic toluene abuse may have caused brain damage,[6] which Demos wanted to determine by way of a psychiatric examination. The court was aware of problems appointed defense counsel was having with Demos refusing to cooperate or speak with him. Demos further displayed bizarre conduct during pretrial hearings, at which he unsuccessfully tried to fire his attorneys and represent himself. Despite such circumstances the trial court refused even to allow Demos, an indigent, a reasonable opportunity to obtain the hospital records from Ohio. When defense counsel protested that eight days

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6. *See* note 2 *supra.*

was insufficent to obtain the out-of-state records, without subpoena power, the court said, "That's the point."

The court likewise denied Demos' motions for a psychiatric examination, despite his indigent status and the presence of significant issues regarding his competence to stand trial and his sanity at the time of the offense. After *Ake v. Oklahoma*, there can be no doubt as to Demos' right to a psychiatric examination under these circumstances. "[A] criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." 470 U.S. at 77. In this case the state did not assure a fundamentally fair trial. It assured the contrary.

2. The state court's ruling was not entitled to "deference" under 28 U.S.C. § 2254(d)

The Court of Appeals correctly conducted "an independent review of the record" to decide whether a *Pate* violation occurred. That was the established standard in this circuit, *see Price v. Wainwright*, 759 F.2d 1549, 1552 (11th Cir. 1985), decided in light of *Maggio v. Fulford*, 462 U.S. 111 (1983).

The standard here was determined by the Magistrate in District Court evidentiary proceedings, wherein an order was issued stating in part as follows:

> "B. *Deference and § 2254(d).* Two things are worthy of note here. First, the deference required by 28 U.S.C. § 2254(d) is *not* required here–*compare Maggio v. Fulford*, 462 U.S. 111 (1983)–because as the State Court's ruling makes clear, the denial of the motion for a psychiatric examination was for lack

> of evidence in support of the motion, and was not a factual determination of competency. Second, even if the State Court's ruling were twisted into an affirmative finding of competency, it would *not* be entitled to deference under 28 U.S.C. § 2254(d), since the exception in § 2254(d)(3) clearly applies because the Circuit Judge himself said that the ruling was based upon "*lack of evidence*." [emphasis in original]

That finding was not specifically objected to by Petitioner in the District Court, nor was it an issue raised by Petitioner in the Court of Appeals. It therefore does not seem properly raised on Petition for Certiorari.

In any event, the "presumption of correctness" generally given state court findings of fact does not apply here due to several exceptions in § 2254(d) set forth in the Constitutional and Statutory Provisions Involved *supra*. The state court (1) did not grant Demos a psychiatric examination, (2) did not give him a fair opportunity to obtain records of his prior mental treatment, and (3) did not empanel a jury to decide his competence to stand trial. The facts thus were not "adequately developed," and the state court did not employ a procedure "adequate to afford a full and fair hearing." The proceedings violated due process as well as the right to counsel, under which Demos was entitled to psychiatric assistance by virtue of his indigent status. *See Ake v. Oklahoma, supra.*

Furthermore, the state court denied Demos the opportunity to develop evidence material to the competency issue, and then pretermitted any further inquiry into that issue for "lack of evidence." The error, therefore, involves a decision of law entitled to no deference

under § 2254(d). Furthermore, any ultimate factual determination of competency *vel non* by the trial court would have usurped the jury role under Ala. Code § 15-16-21 (1975), under which Demos was constitutionally entitled to equal protection. The "merits" thus were not resolved, and the court did not afford a full and fair hearing to develop the facts. Under the exceptions in § 2254(d), the state court's actions were not entitled to deference. *Maggio v. Fulford* compels no other result.

CONCLUSION

Petitioner fails to demonstrate a conflict among the circuits or a question of such public importance as to warrant exercise of certiorari jurisdiction.

Respectfully submitted,

FORREST S. LATTA
NETTLES, BARKER, JANECKY
& COPELAND, P.C.
3300 First National Bank Bldg.
Post Office Box 2987
Mobile, Alabama 36652
Telephone: (205) 432-8786

Counsel for Respondent
Court Appointed

April 29, 1988

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CHRISTOPHER DEMOS,	)	
Plaintiff,	)	CIVIL ACTION
vs.	)	NO. 83-1160-H
W. E. JOHNSON, et al.,	)	
Defendants.	)	

ORDER

This case before the Court is a petition for a write [sic] of habeas corpus pursuant to 28 U.S.C. § 2254. The basis for the petition is that petitioner was not competent to stand trial at the time he was convicted in Alabama state court for first degree murder. This contention fuels three attacks on petitioner's conviction.

The first attack is that the state trial court failed to inquire into the petitioner's competency in compliance with *Pate v. Robinson*, 383 U.S. 375 (1966). The second attack is on the state court's failure to order mental examination of the indigent petitioner by an expert psychiatrist. The third attack is on the breach of a specific agreement between the state court and petitioner's defense counsel to have petitioner examined.

The Magistrate conducted an evidentiary hearing, made findings of fact and recommended conclusions of law. The defendant has filed objections to the findings that there was an express agreement to have petitioner examined at Searcy and that petition's [sic] rights under *Pate* were violated. (The Magistrate found it

unnecessary to address the second of petitioner's contentions). Defendants' objection to the finding of an express agreement is premised on the contention that that issue was not raised prior to the hearing, thus denying defendant the right to present controverting evidence. This argument is utterly without merit. The issue was raised in the amended habeas petition filed by petitioner on July 3, 1984. The issue was restated by the Magistrate in his order dated September 18, 1984. The evidentiary hearing was held on October 31, 1984. Defendants' contention that they could not be aware of this issue and be prepared to defend on it are thus difficult to understand. Defendants had over three months to prepare for the evidentiary hearing. No complaints will be heard now because defendants' preparation was inadequate.

The Magistrate's recommendation, with findings of fact, is hereby adopted as the opinion of the Court. Pursuant to that recommendation, the Court finds and determines the existence of a violation of *Pate v. Robinson, supra,* and further finds a violation of the express agreement. The Court therefore ORDERS the holding of a hearing on whether it is too late to hold a *nunc pro tunc Pate* hearing. The Magistrate will set an appropriate date for this hearing.

IT IS SO ORDERED.

DONE this 26 day of November, 1984.

/s/ W. B. Hand
Chief Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CHRISTOPHER DEMOS, Petitioner, vs. W. E. JOHNSON, et al., Respondents.	))))	CIVIL ACTION NO. 83-1160-H-S

ORDER

Upon consideration of the Supplemental Recommendation of the Magistrate entered on May 16, 1986, the objections filed thereto, and all of the other filings in this action, part one of the Supplemental Recommendation, regarding the pretrial examination agreement, is adopted as the opinion of this Court.

It is ORDERED that Petitioner shall be released forthwith from custody pursuant to the conviction challenged in this action, unless the State retries Petitioner on this charge or charges on or before February 28, 1987. The State shall indicate to this Court within 30 days whether or not Petitioner is to be retried. If an intent to retry is not indicated within 30 days, Petitioner shall be released unconditionally at that time.

IT IS SO ORDERED.

DONE this 18th day of September, 1986.

/s/ W. B. Hand
Chief Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CHRISTOPHER DEMOS, Petitioner,	)	CIVIL ACTION
vs.	)	NO. 83-1160-H-S
W. E. JOHNSON, et al., Respondents.	)	

ORDER

Respondents have filed a notice of appeal in this action. Petitioner, Christopher Demos, has filed a notice of cross-appeal, along with a motion that he be permitted to continue his in forma pauperis status.

Normally, appeals from final judgments in habeas corpus proceedings under 28 U.S.C. § 2254 may not proceed unless a certificate of probable cause is issued. 28 U.S.C. § 2253. It is not necessary, however, for the state or its representative to obtain such a certificate when appealing. *Texas v. Graves*, 352 F.2d 514, 515 (5th Cir. 1965). Therefore, this Court must determine only whether a certificate of probable cause should issue for petitioner's cross-appeal.

In order for a court to issue a certificate of probable cause, the habeas petitioner must "make a 'substantial showing of the denial of [a] federal right.' " *Barefoot v. Estelle*, 103 S. Ct. 3383, 3394, 77 L. Ed. 2d 1090, 1104 (1983). In this case the Court finds that petitioner has made such a showing. As petitioner has indicated in his motion to alter or amend judgment, filed September 29,

1986, and his opposition to the motion to stay, filed October 29, 1986, *Ake v. Oklahoma*, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), provides independent grounds for sustaining this Court's order of September 18, 1986, requiring that petitioner be retried or released. In *Ake*, the Supreme Court held that

> when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Ake, 105 S. Ct. at 1097.

In petitioner's criminal case, he entered a plea of not guilty by reason of insanity. Thus, it appears that he was denied his constitutional right to the assistance of a psychiatrist in his defense. Although this Court relied only on the breach by the State of an express agreement that defendant would receive an independent psychiatric examination as grounds for requiring a new trial, *Ake* apparently provides independent justification for requiring a new trial, or perhaps, as petitioner argues, his unconditional release. In any event, the Court finds that petitioner has made a substantial showing of the denial of a federal right. Therefore, the Court certifies, pursuant to 28 U.S.C. § 2253, that there is probable cause for petitioner's cross appeal.

Federal Rule of Appellate Procedure 24(a) and 28 U.S.C. § 1915(a) both provide that appeals may not be taken in forma pauperis if the district court certifies that the appeal is not taken in good faith. For the

reasons already discussed above, the Court certifies, pursuant to 28 U.S.C. § 1915(a), that petitioner's cross-appeal is taken in good-faith. Petitioner shall be permitted to proceed in forma pauperis.

It is so ORDERED.

DONE this 13th day of November, 1986.

/s/ W. B. Hand
Chief Judge